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No. 945

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES VINCENT TREMONT
a/k/a GEORGE LARRO,
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Daily News, Memphis, Tenn., 1/21/66—60c.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Comes the petitioner and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is not officially reported but is a part of the certified record in this cause. The Opinion of the Sixth Circuit filed on September 30, 1965, is also a part of the appendix hereto.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, U.S.C.A., section 1254 and particularly on the ground that the court below ruled adversely to appellant on the admissibility of the results of a lie detector test, there being

no clear-cut ruling by the Supreme Court of the United States on the issue thus presented, and further on the ground that the appellant was tried as an indigent defendant and was defended in the trial court by a court-appointed attorney, the case involving questions squarely presented as to the rights of such indigent defendant to subpoena witnesses at government expense which issue also has not been clearly regulated by prior opinions of this court.

The judgment sought to be reviewed was decided and filed in the United States Court of Appeals for the Sixth Circuit on September 30, 1965, in cause number 15,839, a copy of which Opinion is appended hereto. Petitioner thereafter filed a Petition to Rehear which was denied on November 26, 1965, a copy of which order is also appended hereto.

QUESTIONS PRESENTED

The questions presented for review are as follows:

(1) Should a defendant about to be charged with a crime who has voluntarily submitted to and passed a lie detector test be allowed to cross-examine a government witness in connection with such result the defendant having signed a waiver of his right not to submit to such tests?

The Trial Court and the Court of Appeals for the Sixth Circuit answered the foregoing question, "No."

Petitioner contends it should be answer, "Yes."

(2) When the testimony of a handwriting expert is produced against an indigent defendant, which expert testimony can only be refuted or contradicted by another expert, should said defendant be allowed to retain another handwriting expert at government expense?

The Trial Court and the Court of Appeals answered "No."

Petitioner contends it should be answered, "Yes."

(3) Should the trial of a defendant charged with a crime be transferred to the district in which the alleged criminal behavior commenced, the original situs of the subject matter of the crime, the residence of some of the government witnesses, and the residence of the defendant and a great majority of defendant's witnesses?

The Trial Court and the Court of Appeals answered, "No."

Petitioner contends it should have been answered, "Yes."

STATEMENT OF FACTS

On April 24, 1963, petitioner was charged in a one count indictment with having transported in interstate commerce a stolen motor vehicle from New Jersey to Tennessee, knowing the said vehicle to have been stolen, in violation of section 2312, Title 18, U.S.C.A. Said offense was alleged to have occurred on or about July 23, 1962. The government contended that petitioner stole a Cadillac automobile in Elizabeth, New Jersey, on July 19th or 20th, 1962. The government further contended that the automobile was transported to Tennessee by petitioner and sold by him in Memphis, using the name of "George Larro" on July 23, 1962.

Prior to petitioner's trial, on the basis of the indigency of petitioner, the Trial Court appointed counsel to represent him at the trial. The record, while seemingly indicating that petitioner did not give his said counsel full co-

operation in the making of his defense, clearly indicates that his defense was grossly encumbered, made overly difficult and complicated by virtue of his residence in the State of New Jersey and the necessity of his trial preparation being conducted in the State of Tennessee.

On November 26, 1963, petitioner was put to trial on his Not-Guilty plea. Again, the record in this cause clearly reflects that his defense was extremely handicapped by difficulty of communications and pretrial consultations with his said court-appointed counsel.

On the trial date, prior to the commencement of the proof, petitioner's court-appointed attorney made an oral motion to have the trial transferred to New Jersey, where there were many witnesses who could have verified his defense. This motion was overruled by the Honorable Trial Court.

Anticipating that the government would use a handwriting expert in its proof, petitioner's counsel moved the court to allow him to retain another handwriting expert at government expense. This motion was overruled by the Honorable Trial Court.

Prior to the trial and during the course of the F.B.I. investigation into the alleged offense, F.B.I. agents requested that petitioner submit to a lie detector test. Petitioner voluntarily submitted to the lie detector test and signed a waiver to the taking and use of said lie detector test. The test resulted favorably to petitioner. During the course of the trial, petitioner's attorney attempted to cross-examine an F.B.I. agent regarding the giving of such test and its results which cross-examination, upon objection by the Attorney-General, was prohibited by the Trial Court.

The jury returned a verdict of "Guilty", and the Hon-

orable Trial Judge sentenced petitioner to five (5) years confinement in the penitentiary.

ARGUMENT

(1) SHOULD A DEFENDANT ABOUT TO BE CHARGED WITH A CRIME WHO HAS VOLUNTARILY SUBMITTED TO AND PASSED A LIE DETECTOR TEST BE ALLOWED TO CROSS-EXAMINE A GOVERNMENT WITNESS IN CONNECTION WITH SUCH RESULT THE DEFENDANT HAVING SIGNED A WAIVER OF HIS RIGHT NOT TO SUBMIT TO SUCH TESTS?

The question thus presented goes not so much to the reliability of lie detector test results as affirmative evidence but to the standards of fair play in handling of individuals during the course of their investigation as a possible defendant in a criminal action. It is conceded that the courts have not yet become convinced that lie detector tests results are sufficiently creditable to be received in evidence in the trial of cases; however, it seems manifestly unfair for the F.B.I. or any other investigative agency to offer such a test to a person under investigation and his ensuing willingness to voluntarily submit, waiving his rights not to so submit, and then to preclude a showing at his trial that he did so voluntarily submit, that he did so waive his right not to submit, and that the results of such tests were favorable to the person under investigation. Such evidence should and probably would have value to a jury in a doubtful situation and would reflect a gesture of determination of innocence on the part of the accused which obviously has creditable depth in the conduct of human affairs.

Petitioner respectfully submits that this question should

be carefully reviewed by this court in the continuing establishment of our system of perfect justice.

(2) WHEN THE TESTIMONY OF A HANDWRITING EXPERT IS PRODUCED AGAINST AN INDIGENT DEFENDANT, WHICH EXPERT TESTIMONY CAN ONLY BE REFUTED OR CONTRADICTED BY ANOTHER EXPERT, SHOULD SAID DEFENDANT BE ALLOWED TO RETAIN ANOTHER HANDWRITING EXPERT AT GOVERNMENT EXPENSE?

In disposing of the foregoing question, the Court of Appeals said, "We do not feel it appropriate to pass on the merits of the interesting question raised by this motion in view of the failure of appellant to show his claimed indigency."

Indigency is a relative status. The Trial Court obviously considered petitioner indigent when it appointed an attorney to represent petitioner during his trial. The Court of Appeals in its Opinion further pointed out the enactment of 18 U.S.C.A., section 3006 A (e), not in effect at the time of petitioner's trial. This new legislative enactment provides an exparte procedure prior to trial, or even during trial, if necessary, for an application for government funds in cases involving indigent defendants for expenses in such matters. No such procedure was available to petitioner at the time of his trial, nor was there ever an inquiry in depth on the specific question of his state of indigency. All we have on this question in the record of this cause are inferences and implications gleaned from facts brought out during investigation into unrelated matters.

By the enactment of section 3006 A (e), the Congress considered that such procedure should be provided for in the law. It is sound legal theory to say that what the legis-

lative branch says now is the law, should always have been the law. Modern improvements in the system of justice by legislative enactment should be made to inure to the benefit of defendants whose cases are still in process.

This petitioner can now benefit from what in theory the law always has been by the granting of this Petition and the ultimate reversal of his case for further handling under an improved system.

(3) SHOULD THE TRIAL OF A DEFENDANT CHARGED WITH A CRIME BE TRANSFERRED TO THE DISTRICT IN WHICH THE ALLEGED CRIMINAL BEHAVIOR COMMENCED, THE ORIGINAL SITUS OF THE SUBJECT MATTER OF THE CRIME, THE RESIDENCE OF SOME OF THE GOVERNMENT WITNESSES, AND THE RESIDENCE OF THE DEFENDANT AND A GREAT MAJORITY OF DEFENDANT'S WITNESSES?

The Court of Appeals held that the foregoing question fell within the discretion of the Trial Judge, and further held that an abuse of this discretion was not shown. In reaching this result, the court cited Rule 22 which requires that a motion to transfer be made "at or before arraignment."

Again petitioner respectfully directs the attention of this Honorable Court to the confusion and lack of communication and organization in his defense resulting from the distance from his residence in New Jersey to the place of his trial in Memphis, Tennessee, a distance of over 1,000 miles. In cases such as this a practical examination of the situation of the accused should be made, and upon a showing of indigency, strict application of procedural rules is not indicated. The record in this cause clearly

shows, as has already been stated, that the returning of the indictment in this case and the scheduling of the trial in Memphis, Tennessee, hampered petitioner considerably, and that petitioner's court-appointed counsel was deprived of the usual opportunity of close pre-trial contact with his client and the time-honored opportunities of clear analysis and timely presentation of all defenses available to him. It is also known that in a case where, the morning of trial has arrived, jurors have been subpoenaed and are waiting, the Attorney-General and all his witnesses are in attendance, the clerk of the court and court reporter stand in readiness, and with the defendant himself present before the bar, most any Trial Judge would tend to be extremely reluctant, at such a point in the proceeding, to order a transfer of the case, and in such a situation would have more of a tendency to abuse the discretion vested in him. This, the petitioner respectfully urges, was the situation in Memphis, Tennessee, on the morning of November 26, 1963.

Petitioner respectfully says he was unjustly prejudiced by this in the following particulars:

(1) He was not tried by men of his peers but, being a northerner, was tried by a southern jury.

(2) The alleged commencement of the criminal offense occurred in the State of New Jersey, and all witnesses in connection therewith resided in the State of New Jersey.

(3) The petitioner, his wife, family, and all possible witnesses including character witnesses resided in the State of New Jersey.

(4) Communications with and cooperation between petitioner and his court-appointed counsel were hampered and encumbered by the 1,000 miles of distance between pe-

titioner's residence and the office of his court-appointed counsel in Memphis, Tennessee, the place of the trial.

(5) The government with its nationwide facilities and unlimited resources obtained an extremely unfair advantage over petitioner in its ability to overcome the obstacles thus presented and with petitioner's inability to overcome such obstacles.

Petitioner respectfully says that the refusal of the Trial Court to transfer the trial of his case to New Jersey represented an abuse of discretion under all the facts and circumstances present in this case, and that this Honorable Court should allow a full hearing and review on the issue thus presented.

CONCLUSION

This is a criminal case. Petitioner has been sentenced to serve five (5) years of his life in a Federal penitentiary. The petitioner respectfully and hopefully pleads with this court to grant him this Petition for Certiorari and to allow a full review and study, argument, briefing, and presentation of the questions herein presented in this, petitioner's court of last resort.

Respectfully submitted,

James F. Schaeffer

JAMES F. SCHAEFFER,
Attorney for Petitioner

APPENDIX - A

No. 15839

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

JAMES VINCENT TREMONT,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Decided September 30, 1965.

Before O'SULLIVAN, Circuit Judge, MCALLISTER, Senior Circuit Judge, and SMITH, Judge of the United States Court of Customs and Patent Appeals.*

O'SULLIVAN, Circuit Judge, James Vincent Tremont appeals from his conviction, on jury trial, of violating the Dyer Act, 18 U.S.C.A. § 2312, by transporting a stolen automobile from Elizabeth, New Jersey, to Memphis, Tennessee. The cause was tried in the United States District Court for the Western District of Tennessee. The proofs easily permitted a jury finding that Tremont stole the car in New Jersey, transported it to Memphis, Tennessee, and sold it there for $4,250.00.

In the following order, we consider such of appellant's assertions of District Court error as we consider merit discussion.

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* Sitting by designation with the Court of Appeals for the Sixth Circuit.

1) Sufficiency of evidence.

Appellant urges that the evidence of guilt was not sufficient to go to the jury. He initially makes the assertion that "this was a rare case in which the government charged and prosecuted the wrong man."

There appears to be no serious quarrel with the sufficiency of proof to establish that a Cadillac convertible was stolen from a used car lot in New Jersey on July 19, 1962, and was sold to a dealer in Tennessee on July 23. Defendant offered evidence tending to show he had remained at his home in New Jersey throughout this entire period. Government witnesses positively identified him, however, as the man who had inspected the car on the lot in New Jersey on the day before and on the day it was stolen; as the man who had registered at a motel in Arkansas and attempted to sell a Cadillac convertible to a dealer there; and as the man who sold the stolen car to buyers in Memphis, and who cashed the check given for purchase of the car at a Tennessee bank. Less positive, but quite credible, identifications were also furnished by the operator of a motel near Memphis at which a man resembling Tremont spent the night of July 23, and by a cab driver who transported a passenger from such motel to the bank and then to Union Station on July 24, 1962, the day following the sale of the stolen vehicle. An expert testified that appellant had written on an application for certificate of ownership, relevant motel registration cards, and the check issued to pay for the car. The person thus identified as the defendant Tremont used the name of George Larro throughout the described activities in Arkansas and Tennessee.

It was for the jury to weigh the evidence and resolve the issues it presented. It is familiar law that the verdict of a jury must be sustained if there is substantial evidence,

taking the view most favorable to the government, to support it. *Glasser* v. *United States*, 315 U.S. 60, 80, 86, L.Ed. 680, 704 (1942). Applying such rule we find that the evidence supported the verdict.

2) Motion to transfer trial to New Jersey.

Error is charged in the denial of appellant's motion for transfer of the prosecution to New Jersey, pursuant to F.R. Crim. P. 21(b). The ground for this motion, made at the beginning of trial, was that it would further the "interest of justice" to try the case where appellant's alibi witnesses would be more readily available. Appellant had announced he was ready to go to trial before this motion was made, and also that he expected to produce some alibi witnesses. He did produce alibi witnesses. We find no error in denying the motion.

Disposition of a motion for change of venue in a criminal case lies within the discretion of the trial judge. This rule applies where the motion is based on convenience and availability of witnesses just as in other cases. *Scott* v. *United States*, 255 F(2) 18 (CA 4, 1958) *cert. denied*, 357 U.S. 942 (1958); *cf. United States* v. *Sorce*, 308 F(2) 299, 301 (CA 4, 1962), *cert. denied*, 377 U.S. 957 (1964); *Gates* v. *United States*, 122 F(2) 571, 577 (CA 10, 1941), *cert. denied*, 314 U.S. 698, 86 L. Ed. 558 (1942). In addition, Rule 22 requires that a motion to transfer be made "at or before arraignment" unless otherwise prescribed by the rules or the court. Compare *Cagnina* v. *United States*, 223 F(2) 149, 154 (CA 5, 1955); *cf. Poliafico* v. *United States*, 237 F. (2) 97, 113 (CA 6, 1956), *cert. denied*, 352 U.S. 1025, 1 L.Ed.(2) 597 (1957). We are shown nothing to indicate an abuse of discretion by the trial judge in denying the tardy motion made in the present case.

3) Lie detector evidence.

Appellant also complains of trial court's refusal to allow in evidence the results of a lie detector test assertedly taken by appellant. It is tacitly recognized that federal courts have consistently denied admission of such evidence. *E.g., McCroskey* v. *United States,* 339 F(2) 895, 897 (CA 8, 1965); *Marks* v. *United States,* 260 F(2) 377, 382 (CA 10, 1958), *cert. denied,* 358 U.S. 929 (1959); *Frye* v. *United States,* 293 Fed. 1013 (CA DC, 1923); *United States* v. *Stromberg,* 179 F. Supp. 278 (S.D. N.Y. 1959). Nothing appears to have been offered to the trial court to upset the longstanding judicial distrust of such evidence, and we are not ourselves prepared to reexamine the traditional rule in a case thus presented.

4) Refusal to provide an expert witness for defendant at government expense.

Motion was made at the outset of the trial for appointment of a handwriting expert at government expense to meet anticipated expert testimony for the government. Compare 18 U.S.C.A. §3006A(e), not in effect at the time of appellant's trial. We do not feel it appropriate to pass on the merits of the interesting question raised by this motion in view of the failure of appellant to show his claimed indigency.

The only indications of appellant's indigency in the record are the appointment of counsel to represent him and the court's order allowing him to subpoena two alibi witnesses at government expense. No formal order appointing counsel appears to have been entered, and opening colloquy between trial counsel and the court suggests it was left to counsel "to see whether or not he was an indigent within the meaning of the rule." The record also shows,

however, that appellant had originally retained counsel in New Jersey and in Tennessee without appointment, and does not indicate that Tennessee counsel's later motion to withdraw was granted on the basis of nonpayment of fees. It is quite clear that the court did not inquire into indigency in granting the motion to subpoena witnesses at government expense. The present appeal was argued by privately retained counsel who have simply assumed appellant was indigent at the time of trial.

The record before us discloses that appellant was not indigent at the time of his trial. Although he testified that he was without funds to bring seventeen named alibi witnesses to Memphis for the trial, his wife and two others appeared without government-expense subpoenas, and one of these testified that appellant's wife had made the plane reservations for him. Appellant himself flew to Memphis at least twice to prepare for his trial, and his own testimony offers several other indications of nonindigency. Perhaps the most impressive of these is the fact that he was purchasing a home on "contract mortgage" for $15,500 and had refused an offer of $25,000 for it after spending some $1,200 in cash on improvements. We cannot say on this record that appellant has established his title to whatever nonstatutory rights an indigent defendant may have to government-paid expert assistance.

5) The District Judge's instructions to the jury.

In response to a question from the jury, the trial court supplemented its charge with the statement that if they found appellant had possession of the stolen automobile in Memphis, "such possession *would raise an inference* against the defendant that he transported or participated in the transportation of the automobile in question in inter-

state commerce, that is, in the absence of an explanation of such possession." (Emphasis supplied.) Since the legal distinction between presumptions and merely permissive inferences is hardly self-defining to the average juror, the statement that an "inference" *would* be raised, standing alone, may not adequately emphasize the jury's freedom to accept or reject the suggested inference. We believe any error in this regard was cured by the court's subsequent instruction that "you don't *assume* that transportation, you understand, just from the sale of the car." (Emphasis supplied.)

Even aside from this clarification, we believe the court's main instructions made it clear to the jury that an inference is something they might, but need not, conclude. The thrust of the main charge was that "unexplained possession of recently stolen property is no more than a circumstance to be considered by you in connection with all the other facts and circumstances of the case in determining the question of the defendant's guilt or innocence * * *." A charge was given on the use of circumstantial evidence, and the jury was specifically reminded of this charge in the later instructions.

Taken as a whole, the court's instructions clearly conform to establish law. *E.g., Travers* v. *United States,* 335 F(2) 698, 700-701 (CA DC 1964); *McKnight* v. *United States,* 309 F(2) 660 (CA DC 1962); *Bray* v. *United States,* 306 F(2) 743, 746-48 (CA DC 1962); *Prince v. United States,* 217 F(2) 838 (CA 6, 1954); Manual on Jury Instructions in Federal Criminal Cases, 36 F.R.D. 457, 663-65 (1965).

No discussion is needed to dispose of other questions raised by appellant.

Judgment affirmed.

APPENDIX - B

No. 15839

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES VINCENT TREMONT,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA
Defendant-Appellant

ORDER DENYING PETITION FOR REHEARING

Before O'Sullivan, Circuit Judge, McAllister, Senior Circuit Judge and Smith, Judge of U.S. Court of Customs and Patent Appeals.

This Cause is before the Court upon the petition for rehearing filed by the defendant-appellant and on due consideration thereof

It Is Ordered that said petition be and the same is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.